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No. 82-15

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the warrantless entry by police onto petitioner's fenced and posted field by way of an unobstructed footpath violated the Fourth Amendment.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 31-66) is reported at 686 F.2d 356. The opinion of the panel (Pet. App. 25-30) is reported at 657 F.2d 85. The opinion of the district court (Pet. App. 21-24) is not reported.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 67) was entered on May 5, 1982. The petition for a writ of certiorari was filed on July 2, 1982, and was granted on January 24, 1983. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Kentucky for manufacturing marijuana, in violation of 21 U.S.C. 841(a). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The full court subsequently granted the government's petition for rehearing en banc and reversed the suppression order (*id.* at 31-66).

1. The evidence adduced at the suppression hearing established that on July 18, 1980, an anonymous informant advised a Kentucky state police officer that petitioner was growing marijuana on his farm. The officer had heard other reports in the community to the effect that petitioner was engaged in some kind of questionable activity on his farm, so the officer, joined by a second detective, drove to petitioner's farm to investigate (J.A. 2-3).

When the officers arrived at the farm, they drove down a road past petitioner's house to a point about three-quarters of a mile from the house at which they encountered a locked gate with a "No Trespassing" sign. While the gate precluded vehicular access, there was no fence at one end of the gate, and there was a path around the gate at that point, which the officers followed (J.A. 3, 5, 16, 22, 23). They had walked several hundred yards along the road on the other side of the gate when they heard someone yelling at them from a distance that there was no hunting allowed. They announced that they were police officers and walked towards the place where they had

heard the person shouting at them. When they arrived there, however, they did not find anyone (J.A. 3-4). The officers then returned to the road, walked some distance farther down the road, and discovered a large field full of marijuana (J.A. 4). The officers subsequently arrested petitioner for manufacturing a controlled substance, and, after further inquiries by the officers prompted by a neighbor's statement, petitioner eventually led them to a second marijuana field (J.A. 10-11). The fields had allegedly been leased by petitioner to two other persons for six months (J.A. 9, 32-35).

2. The district court suppressed the evidence of the discovery of the marijuana (Pet. App. 21-24). The court noted that the gate across the road was locked, that the property was posted with "No Trespassing" signs, and that the fields where the marijuana was located were in a secluded part of the farm (*id.* at 22).[1] On the basis of these factors, the district court concluded that petitioner had a reasonable expectation of privacy in the area where the marijuana was discovered and that, because the officers had entered that area without a warrant, the discovery of the marijuana would not be admissible at trial.

A panel of the court of appeals affirmed the suppression order (Pet. App. 25-30). The panel noted that under the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), warrantless

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[1] The testimony at the suppression hearing indicated that a row of trees obscured the view of the field from a barn on petitioner's property (J.A. 30-31). The detective testified that the field where the marijuana was found was visible from the gate, but that it was not possible to determine from that distance that it was marijuana growing in the field (J.A. 16).

searches are permitted of any area outside private residences and the "curtilage" around those residences and that the field searched here was not within the curtilage (Pet. App. 27-28). The panel concluded, however, that the *Hester* decision had been undercut by this Court's subsequent decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which held that Fourth Amendment rights generally turn on the presence of a legitimate expectation of privacy, not on distinctions in property concepts (Pet. App. 28). On the facts of this case, the panel held, petitioner had a reasonable expectation of privacy in the field where the marijuana was growing because the field was located on the other side of a locked gate marked with "No Trespassing" signs (*id.* at 28-29). Because the Sixth Circuit's prior decision in *United States* v. *Hassell*, 336 F.2d 684 (1964), cert. denied, 380 U.S. 965 (1965), relied on the *Hester* "open fields" doctrine, the panel declared that *Hassell* is "no longer the law of this circuit" (Pet. App. 30).

3. On rehearing en banc, a majority of the full court disagreed with the panel's conclusion that *Hester* had been undercut by *Katz*. The court noted that while this Court had been called upon in *Katz* to apply the Fourth Amendment to circumstances—the monitoring of a telephone conversation—"that could not have been contemplated at the time the Amendment was formulated and adopted," the open fields doctrine of *Hester* simply made a distinction that was " 'as old as the common law' " (Pet. App. 34-35). The court also observed that there were indications in the *Katz* opinion itself that the *Hester* doctrine was still considered valid (*id.* at 35-36), and that this Court had on several occasions since *Katz* referred to *Hester* without ever suggest-

ing that its principles had been diluted (*id.* at 37). The court explained that the requirements of the Fourth Amendment did not apply here because "[t]he human relations that create the need for privacy do not ordinarily take place in [an open field]" (*id.* at 38). The court concluded that any expectation of privacy that a property owner might have in his open field was, as a matter of law, not one that society is prepared to recognize as reasonable (*id.* at 36).

Chief Judge Edwards and Judges Keith, Lively, and Jones dissented (Pet. App. 38-65), contending that the open fields doctrine of *Hester* applies only to areas from which the public is not excluded or to an object or activity that is exposed to public view (*id.* at 52-53). Because they concluded that petitioner had taken measures to exclude the public from his property that gave rise to a reasonable expectation of privacy, the dissenters expressed the view that the open fields doctrine did not permit the entry onto petitioner's field (*id.* at 60-65). The dissenters added that adherence to their view would not unduly hamper law enforcement because police lawfully could have used helicopters to observe the marijuana from the air (*id.* at 63-64). Judge Lively wrote separately to express his view that this case did not involve an "open field" at all within the meaning of *Hester* (*id.* at 66).

SUMMARY OF ARGUMENT

A. In *Hester* v. *United States*, 265 U.S. 57, 59 (1924), this Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." This rule was not undermined by this Court's decision in *Katz* v. *United*

States, 389 U.S. 347 (1967), which held that warrantless wiretapping of a public telephone violated an individual's legitimate expectation of privacy. To the contrary, this Court cited *Hester* with approval in *Katz* itself, and has done so in subsequent decisions. This is because the *property* interest that a landowner has in his field is not equivalent to a *privacy* interest that gives rise to Fourth Amendment protection. Apart from the curtilage surrounding a residence, an individual does not have an expectation of privacy that society is prepared to recognize as "reasonable" in an open field.

B. Posting and fencing an open field does not necessarily alter its character so as to create a protected Fourth Amendment privacy interest in the field. While posting a fence puts an outsider on notice that he is about to commit a trespass, the facts of *Hester* make clear that the "open fields" doctrine is based on the lack of privacy expectation in the field and does not depend on whether or not the police officer is aware that he is trespassing. The posting of "No Trespassing" signs, as a practical matter, gives a landowner little assurance that outsiders will not enter his property; indeed, state statutes typically give law enforcement officials, such as game wardens, specific authority to enter private posted lands to monitor compliance with state wildlife laws. See, *e.g.*, Ky. Rev. Stat. Ann. §§ 149.090, 150.090 (Bobbs-Merrill repl. 1980 & 1982 Cum. Supp.).

Nor does the existence of a fence surrounding an open field necessarily increase the expectation of privacy in that field. Fences around large areas of rural property are usually designed to mark a boundary or to keep animals in rather than to keep people out, and they pose little impediment to entry by a person. Like posting, the existence of such a fence does not

give a landowner a reasonable assurance that outsiders will not enter onto his land. Accordingly, the courts generally have held that there is no protected Fourth Amendment privacy interest in a field that is surrounded by a nonexclusionary fence.

In the circumstances of this case, it is clear that petitioner, by erecting a "No Trespassing" sign and a gate across the road, did not convert his open field into an area protected by the Fourth Amendment. First, because petitioner leased his fields to other persons and relinquished full control over them, he plainly had no expectation that persons unknown to him would not enter past the sign and gate as invitees of the lessee. Moreover, it is undisputed that the gate blocked only vehicular passage, and there was no physical impediment to entry by foot; indeed, the officers entered on a well-traveled footpath. Thus, the only basis for petitioner, or even the lessees, to claim that the open field was converted into an area protected by the Fourth Amendment is the notice of entry onto private property provided by the posted signs. That is an insufficient basis for a landowner reasonably to expect that no outsider will enter his field. Since *Hester* and *Katz* plainly establish that the fact of ownership itself does not create a protected Fourth Amendment interest in a field, the officers' entry onto petitioner's field was constitutional.

C. A landowner may take more substantial measures to exclude outsiders from his field, such as erecting a barrier effectively designed to prevent entry by other persons. Arguably, such action would give him a reasonable expectation of some degree of privacy in the field. Even so (or even assuming that petitioner's contention is accepted that mere posting of a field gives rise to a legitimate expectation of privacy), that expectation of privacy is a limited one

that does not approach the privacy interest that an individual has in his home or office, or even such areas of concededly reduced privacy as his automobile. Even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private. More important, if the police are mistaken in their suspicion of criminal activity, their unjustified entry onto the field is at most a minimal disruption of an individual's privacy; the officers will observe only what is ordinarily found in a field, such as cornstalks and cows. On the other hand, when police enter a home, they intrude into the area that people reserve for their most personal and private matters.

The "reasonableness" of a search or a seizure under the Fourth Amendment is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). Because of the magnitude of the privacy invasion involved in a search of a home, this Court has concluded that the Fourth Amendment establishes two prerequisites to sustain the reasonableness of such a search: (1) the substantive standard for balancing societal law enforcement against individual privacy interests is probable cause; (2) as a procedural protection to minimize the risk of a mistake, probable cause is to be determined by a neutral and detached magistrate. In the case of an entry onto a field, where any privacy intrusion is so greatly diminished, it is reasonable that the prerequisites to such an entry be more relaxed, as the Court has recognized in other contexts where there is a substantially reduced privacy intrusion. For example, the warrant requirement does not apply to a search of an automobile,

which is an area of reduced privacy expectation. See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977). And police may effect brief investigatory detentions on suspicion that does not amount to probable cause. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968). In a situation where police have reason to suspect that evidence of criminal activity will be found in a field—even one in which the landowner has taken effective measures to prevent entry by outsiders arguably justifying recognition of some degree of privacy interest—it is "reasonable" within the meaning of the Fourth Amendment to enter the field on the basis of a reasonable suspicion of criminal activity, given the comparatively minor privacy intrusion entailed in the entry. Thus, even assuming arguendo that petitioner had some legitimate expectation of privacy in his field, the officers' entry was constitutional because it was based on information that gave them a reasonable suspicion that criminal activity was afoot.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE A WARRANT BASED UPON PROBABLE CAUSE AS A PRECONDITION TO ENTRY ONTO A FIELD

A. The Open Fields Doctrine Retains Its Vitality Today

The "open fields" doctrine was first enunciated by this Court in *Hester* v. *United States*, 265 U.S. 57 (1924). In that case, two revenue officers entered onto the defendant's property and, from a distance of 50-100 yards from his house, saw the defendant hand another person what appeared to be a gallon jug of illicitly distilled whiskey. The Court held, in a unanimous decision authored by Justice Holmes, that the fact that the officers had trespassed on the defendant's property was not a reason for suppressing the observations made by the officers. The Court explained

(265 U.S. at 59): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

While the Court's opinion in *Hester* is conclusory, it has become the source of a well-entrenched rule of law, *viz.*, that the open areas beyond the house and its "curtilage" are not within those areas protected by the Fourth Amendment.[2] This rule is soundly based in the specific language of the Fourth Amendment and its limited proscription of only those searches and seizures that are "unreasonable."

Petitioner contends (Br. 14-20) that this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), "complete[ly] discredit[ed]" (Br. 17) the open fields doctrine of *Hester*. But there is nothing in *Katz* to suggest repudiation of the basic prin-

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[2] The curtilage is an area surrounding the house that is habitually used for family purposes and hence is of heightened privacy interest. See *Black's Law Dictionary* 346 (5th ed. 1979). In the urban setting, for example, a fenced yard appurtenant to the house excluding outsiders would generally be considered curtilage. See, *e.g.*, *United States* v. *Martino*, 664 F.2d 860, 879 (2d Cir. 1981) (Oakes, J., concurring); *Hobson* v. *United States*, 226 F.2d 890, 894 (8th Cir. 1955). The common law recognized that the curtilage was to be treated as a part of the house for some purposes (see 4 W. Blackstone, *Commentaries*, ch. 16, at 225 (Univ. of Chicago Press ed. 1979)), and the Court in *Hester* cited to this common law rule. 265 U.S. at 59. Accordingly, it has been recognized that the open fields doctrine does not permit warrantless searches of the curtilage, where the homeowner is considered to have a legitimate expectation of privacy. See, *e.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 993 (4th Cir. 1981); *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956).

ciple of the open fields doctrine. In *Katz*, the Court simply held that the Fourth Amendment protected private conversations conducted in a public telephone booth against warrantless wiretapping. To be sure, *Katz* recognizes that the Fourth Amendment may extend to an area that is not within the curtilage of a privately-owned building, but it does so in the specific context of electronic surveillance of a private telephone conversation; it certainly does not suggest extension of Fourth Amendment protection to an open area like a field,[3] even if an individual may prefer that his activity there remain private.[4]

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[3] The Court in *Katz* noted that the issue involved there, because of significant scientific advances in the area of electronic surveillance and "the vital role that the public telephone has come to play in private communication," was one that could not specifically have been contemplated by the Framers or even by the Court in earlier years. See 389 U.S. at 352; *id.* at 362 (Harlan, J., concurring). As the court below noted (Pet. App. 34-35), no comparable technological advance provides any basis for affording a greater degree of Fourth Amendment protection to a field today than at the time *Hester* was decided or when the Fourth Amendment protection of "persons, houses, papers, and effects" was first enacted.

[4] To buttress his contention that *Katz* discredited *Hester*, petitioner adopts (Br. 15-19) the dissent's premise (see Pet. App. 44-47) that the open fields doctrine is actually based on this Court's decision in *Olmstead* v. *United States*, 277 U.S. 438 (1928), which was expressly overruled by *Katz*. This premise is false. The unremarkable declaration of the Court in *Hester* that the special protection of the Fourth Amendment "is not extended to the open fields" (265 U.S. at 59) did not rest on the subsequent establishment of a much more general, and controversial, rule in *Olmstead* holding that the Fourth Amendment protects only against physical invasions of certain areas. That is quite clear from the decisions themselves. *Hester* was a unanimous decision; *Olmstead*, decided

Indeed, both the majority opinion in *Katz* and Justice Harlan's oft-cited concurring opinion, each of which is relied upon by petitioner (Br. 18-19) and by the dissent below (Pet. App. 48-50), discuss *Hester* approvingly. Citing *Hester*, the Court noted in *Katz* that "[i]t appears to be common ground * * * that an open field is not [an area protected by the Fourth Amendment]." 389 U.S. at 351 n.8. Justice Harlan stated that a "telephone booth is an area where, like a home, * * * and *unlike a field* [citing *Hester*], a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (emphasis added). See also *id.* at 361. Moreover, since *Katz* this Court has relied on *Hester* and consistently cited it approvingly in other decisions. See *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865-866 (1974); see also *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 6, 9; *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977); *United States* v. *Santana*, 427 U.S. 38, 42 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 450 (1973); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 393 n.6 (1971).

An examination of the reasoning of *Katz* also makes clear that it casts no doubt on the continuing vitality of *Hester*. *Katz* holds that the Fourth Amendment

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only four years later, was a 5-4 decision so controversial that it prompted each of the dissenters to write separately. Three of the dissenters had joined the Court's decision in *Hester*, including Justice Holmes, its author, and none saw any reason to repudiate their previous decision in the course of their dissents in *Olmstead*. Hence, *Katz*'s overruling of *Olmstead*—in the same wiretapping context in which *Olmstead* was handed down—casts no doubt on the validity of the distinct, and independent, open fields doctrine of *Hester*.

protects areas where an individual has a "justifiabl[e]" expectation of privacy. 389 U.S. at 353. Justice Harlan's concurring opinion amplifies this concept by suggesting a two-part inquiry to determine whether an area is protected by the Fourth Amendment (389 U.S. at 361)—whether the individual, by his conduct, has exhibited a subjective expectation of privacy; and whether that expectation is "one that society is prepared to recognize as 'reasonable' "—and the Court generally has adopted this formulation as embodying the *Katz* rationale. See *United States* v. *Knotts*, *supra*, slip op. 4-5; *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. The Court's holding in *Hester*, in terms of the *Katz* analysis, is simply that society does not recognize as reasonable an expectation of privacy in open fields, and nothing in *Katz* suggests that a different rule should apply.

Thus, the courts of appeals generally have recognized that *Hester* retains its force after *Katz* as standing for the general proposition that an individual ordinarily does not have a legitimate expectation of privacy—in particular, one that implicates the protections of the Warrant Clause of the Fourth Amendment—in an open field. In the words of the Ninth Circuit, *Hester* indicates that "open fields are not areas in which one traditionally might reasonably expect privacy." *United States* v. *Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). Thus, the court in *Freie* held that, even if the owners had subjective expectations of privacy in their private field surrounded by a fence, "those expectations were not objectively reasonable." *Ibid.* See also *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979);

Patler v. *Slayton*, 503 F.2d 472, 478 (4th Cir. 1974); S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), quoted in *United States* v. *Paul*, 614 F.2d 115, 119 (6th Cir.) (Phillips, J., concurring), cert. denied, 446 U.S. 941 (1980) (post-*Katz* discussion of federal wiretapping statute noting that expectation of privacy in an open field is "clearly unjustified").

It is true, of course, that unconsented entry onto open fields often violates the landowner's *property* rights. But *Hester* undeniably stands for the proposition that a legal property interest is not necessarily equivalent to an interest protected by the Fourth Amendment, and the Court has consistently adhered to this view. See generally *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. This principle was not challenged in *Katz;* indeed, it is *Katz* that emphasizes that the Fourth Amendment focuses on legitimate privacy interests and is not coextensive with property rights. See 389 U.S. at 351-353; see also *Payton* v. *New York*, 445 U.S. 573, 591 n.33 (1980); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 151 (Powell, J., concurring).

Thus, it is ironic, to say the least, that primary reliance is placed upon *Katz* to argue that the Warrant Clause protects open fields by virtue of an individual's ownership of those fields. The fact that *Katz* recognized the existence of a legitimate expectation of privacy in a public place because of the peculiarly private nature of the activity—a phone conversation—does not vitiate *Hester* in any way. To the contrary, *Katz* buttresses the rationale of the open fields doctrine, namely, that an individual may lack a legitimate expectation of privacy in an area like a field, where private activities do not ordinarily take place, even if the field is private property.

It is also undoubtedly true that an individual may have a strong subjective expectation of privacy in activity he carries on in an open field, depending on the distance of the field from areas frequented by the public and the nature of the terrain (cf. Pet. Br. 23). The probability that another person will observe his activity "in the middle of nowhere" is small. But an individual has an analogous expectation of privacy in activities undertaken late at night in an apparently deserted alley or forest; obviously, however, he can have no constitutional objection if a policeman stumbles upon him when he is engaged in criminal activity. Clearly, then, an expectation of privacy entitled to Fourth Amendment protection cannot be grounded merely on the improbability of being observed. In sum, both before and after *Katz*, there is no basis for recognizing a legitimate expectation of privacy in an open field, and hence there is no reason to modify the traditional open fields doctrine here.[5]

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[5] The conclusion of *Hester* that the Fourth Amendment is not violated when police trespass onto an open field does not suggest that a landowner is powerless to prevent such a trespass. As a practical matter, law enforcement officers likely will enter onto private property only if they have good reason to suspect that criminal activity is afoot. If, however, a landowner is being harassed by unjustified police entry onto his property, he can seek damages or an injunction prohibiting the police from further trespass, in accordance with remedies supplied by state law.

B. The Open Fields Doctrine May Apply To Fields That Are Posted And Fenced

1. *Petitioner's Posting of Signs and Erection of a Gate Did Not Convert His Open Field Into an Area in Which He Had a Legitimate Expectation of Privacy*

Petitioner contends (Br. 20-23), adopting the view of the dissent (Pet. App. 50-53), that, to the extent it survives at all, the open fields doctrine today is quite limited in scope: it permits police to observe objects that are exposed to the public and allows them to conduct a warrantless search only in an area from which the public is not excluded. If an owner of property has manifested in any way that his property is not open to the public, however—for example, by posting a sign—petitioner contends that the police may not enter except with a warrant based upon probable cause, irrespective of the nature of the property and the degree to which the entry can reasonably be expected to infringe upon the individual's privacy. Because petitioner's field was posted and vehicular access blocked by a gate across the road, he contends (Br. 23) that the warrantless police entry here violated the Fourth Amendment. In the words of the dissent, "the public was provided with more than adequate notice that they were not to trespass on [petitioner's] farm"; therefore the search "was not limited to areas of public access" and thus "not within the narrow confines of the Open Fields Doctrine" (Pet. App. 62).

This crabbed version of the open fields doctrine misperceives the principles underlying the Fourth Amendment and, moreover, cannot be squared with the holding in *Hester*. An open field is not subject to the special constitutional protection that extends to "persons, houses, papers, and effects" because it is not an area in which a person ordinarily conducts private

activities or can reasonably expect that activities will remain private. The posting of a field or placing a gate across an access road does not alter that fundamental fact and hence does not magically transform a field into an area protected by the Fourth Amendment.

Turning first to posting, it is uncontested that the officers here walked past a "No Trespassing" sign posted on the gate outside petitioner's field (see J.A. 41), but that fact alone surely did not create a legitimate expectation of privacy in the field. The effect of posting a field is simply to put an individual on notice that he is about to trespass onto private property and to dispel any notion that his entry is welcome. Clearly, a police officer who enters onto posted property has not simply committed an unintentional trespass. But it is evident from *Hester* itself that the open fields doctrine does not apply only to unintentional trespasses. While the opinion in *Hester* does not specify whether the property was fenced or posted, the revenue officers there secreted themselves at a distance of 50-100 yards from the house, which they could hardly have imagined to be public property. Indeed, one of the revenue officers himself testified that he supposed the officers were trespassing on Hester's property. 265 U.S. at 58. Thus, the Court found no Fourth Amendment violation in *Hester* even though the officers were aware that they were trespassing. *Hester* holds that a knowing trespass onto an open field, although perhaps violative of state property law, does not violate the Fourth Amendment because a field is not an area in which there is a legitimate expectation of privacy; the posting of "No Trespassing" signs does not alter that conclusion.

A posted field remains an "open field" because a landowner's announcement of his desire that persons

not enter an open area does not equal an expectation that they will not enter there. To the contrary, landowners generally realize that their open land is liable to be crossed by others who have some reason to do so—for example, if it is a convenient short cut—despite the presence of a "No Trespassing" sign. See, *e.g.*, *United States* v. *Edmonds*, 611 F.2d 1386, 1388 (5th Cir. 1980). Accordingly, a landowner has no reasonable expectation that objects that he leaves in such a field will not be observed by a member of the public.

Moreover, state statutes typically permit access by law enforcement officers to private property under circumstances in which access to enclosed structures would not be allowed. For example, Kentucky law gives conservation officers and all other law enforcement officers "the right to go upon any land of any person or persons whether private or public" for various purposes connected with fish and wildlife research and the enforcement of fish and game laws. Ky. Rev. Stat. Ann. § 150.090 (Bobbs-Merrill repl. 1980). See also Ky. Rev. Stat. Ann. § 149.090 (Bobbs-Merrill repl. 1980 & 1982 Cum. Supp.) (forest wardens authorized to trespass in the course of their duties). This specific authorization is illustrative of a more general recognition that in many situations a law enforcement officer is empowered to enter upon private property in the performance of his duties where an entry by a private party would constitute a trespass. See, *e.g.*, *United States* v. *Knight*, 451 F.2d 275, 278 (5th Cir. 1971), cert. denied, 405 U.S. 965 (1972); *United States* v. *Capps*, 435 F.2d 637, 640 & n.4 (9th Cir. 1970). Thus, a landowner who posts his field can have no reasonable expectation of complete privacy from law enforcement officers.

Apart from the posting of the field, petitioner (Br. 23) and the dissent (Pet. App. 62) rely on the existence of some fences and the fact that the road was blocked by a locked gate to buttress their view that petitioner had a legitimate expectation of privacy in his field. It is apparent for several reasons, however, that the fences and gate did not enhance petitioner's reasonable expectation of privacy in his field.

At the outset, we note that even the existence of a fence completely surrounding rural property does not necessarily give rise to a significant expectation of privacy in a field. Ordinarily the purpose of such a fence is to mark a boundary or to keep farm animals within the property. As one court has noted, such rural fences "are designed more to keep livestock under control than to keep people out." *State* v. *Stanton*, 490 P.2d 1274, 1279 (Or. Ct. App. 1971). See also *United States* v. *Williams*, *supra*, 581 F.2d at 454; *Giddens* v. *State*, 156 Ga. App. 258, 259, 274 S.E.2d 595, 597 (1980), cert. denied, 450 U.S. 1026 (1981). Rural landowners recognize that hunters and other members of the public frequently enter private fields (see *State* v. *Cemper*, 209 Neb. 376, 307 N.W.2d 820, 823 (1981); *State* v. *Stanton*, *supra*, 490 P.2d at 1279)), and that an ordinary livestock fence does not present much of an obstacle to entry by a person (see *Giddens* v. *State*, *supra*, 156 Ga. App. at 259, 274 S.E.2d at 597).[6] Accordingly,

[6] Indeed, in at least two of the reported cases concerning the applicability of the open fields doctrine to a fenced field, law enforcement officers entered the field after the criminal activity was reported to them by members of the public who had trespassed on the property. See *State* v. *Stanton*, *supra* (two teenagers); *State* v. *Byers*, 359 So.2d 84 (La. 1978) (hunter).

while he may hope that persons will be discouraged from trespassing or inadvertently wandering onto his property, a landowner has little expectation that persons who desire to enter his field will be deterred by the presence of a boundary or livestock fence surrounding the entire property any more than they would be by the erection of a "No Trespassing" sign.[7] Significantly, the record in *Hester* makes clear that the officers there crossed a fence in order to reach their vantage point (see Transcript of Record at 16, 19-20, *Hester* v. *United States*, *supra* (No. 243, 1923 Term)), yet the Court still characterized their entry as onto an "open field" in which there was no Fourth Amendment protection.

Recognizing the inevitable limitations on the degree of privacy that reasonably can be expected in an open field, the courts of appeals, both before and after *Katz*, generally have declined to suppress evidence seized in an open field, even where the property is fenced and posted. For example, in *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977), the court held that a fenced goosehouse came within the ambit of the open fields doctrine because the goosehouse was beyond the curtilage and the fence was for the purpose of containing the geese. Significantly, the court dismissed out of hand the relevance of a perimeter fence, finding that most of the 20-acre farm "was clearly open fields" even though

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[7] A fence, depending on its nature, may designate a particular area of a farm as more private, and a fence closely surrounding a residence may be an important factor in defining the curtilage. See, *e.g.*, *United States* v. *Van Dyke*, *supra*, 643 F.2d at 994; *United States* v. *Williams*, *supra*, 581 F.2d at 454. But a boundary fence that surrounds a large farm does not convert all the open areas on the farm into areas protected by the Fourth Amendment.

the entire farm was surrounded by a fence. *Id.* at 1297. See also *United States* v. *Long*, 674 F.2d 848, 852-853 (11th Cir. 1982); *United States* v. *Williams*, *supra*; *United States* v. *Freie*, *supra*; *McDowell* v. *United States*, 383 F.2d 599 (8th Cir. 1967); *Care* v. *United States*, 231 F.2d 22 (10th Cir.), cert. denied, 351 U.S. 932 (1956); *Janney* v. *United States*, 206 F.2d 601 (4th Cir. 1953); *Stark* v. *United States*, 44 F.2d 946 (8th Cir. 1930); but see *United States* v. *Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982), petition for cert. pending, No. 82-508 (fenced-in barn held within curtilage).[8]

By the same token, several state court decisions have recognized the applicability of the open fields doctrine despite posting or the existence of a fence. See *Luman* v. *State*, 629 P.2d 1275 (Okla. 1981) (barbed wire fence); *DeMontmorency* v. *State*, 401 So. 2d 858 (Fla. Dist. Ct. App. 1981) (officers crossed over gate into wooded area); *State* v. *Cemper*, *supra* (entry through open gate in barbed wire fence); *Giddens* v. *State*, *supra* (barbed wire fence); *People* v. *Lashmett*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979), cert. denied, 444 U.S. 1081 (1980) (officers climbed over two fences); *Ford* v. *State*, 264 Ark. 141, 142, 569 S.W.2d 105, 106 (1978), cert. denied, 441 U.S. 947 (1979) (posted and fenced field with locked gate); *State* v. *Wren*, 115 Ariz. 257, 564 P.2d 946 (Ct. App. 1977) (barbed wire fence); *Common-*

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[8] Numerous other decisions, not involving fields described as fenced or posted, also recognize the continuing vitality of the *Hester* open fields doctrine after *Katz*. See, *e.g.*, *Patterson* v. *National Transportation Safety Board*, 638 F.2d 144 (10th Cir. 1980); *United States* v. *Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Basile*, 569 F.2d 1053 (9th Cir. 1978); *Patler* v. *Slayton*, *supra*; *United States* v. *Brown*, 487 F.2d 208, 210 (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974).

wealth v. *Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) (field posted and surrounded by embankments and barbed wire fences); *State* v. *Stanton*, *supra* ("a couple" of livestock fences); *Casey* v. *State*, 87 Nev. 413, 488 P.2d 546 (1971) (fenced ranch); but see *State* v. *Brady*, 406 So. 2d 1093 (Fla. 1981), cert. granted, 456 U.S. 988 (1982) (violation of Fourth Amendment found where officers cut chain lock and rammed through gate); *State* v. *Byers*, 359 So. 2d 84 (La. 1978) (marijuana field held not "open" because posted and road chained). These decisions rest simply on the notion that posting a field or erecting a nonexclusionary perimeter fence does not sufficiently change the nature of a person's expectation of privacy in an open field that it is reasonable to attach a constitutionally protected privacy right to items present or activities carried on in that field.[9]

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[9] Of course, there are areas outside the home that are sufficiently private to warrant Fourth Amendment protection. Thus, the courts have invalidated searches of enclosed structures (see, *e.g.*, *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975); *Adair* v. *State*, 298 So. 2d 671, 674 (Ala. Crim. App. 1974)) or open areas found to be part of the curtilage (see, *e.g.*, *United States* v. *Van Dyke*, *supra*; *Wattenburg* v. *United States*, 388 F.2d 853, 857-858 (9th Cir. 1968)).

It should be noted that, contrary to petitioner's (Br. 15-20) and amici curiae's (see note 12, *infra*) (ACLU Br. 18-23) suggestion, consideration of the traditional concept of curtilage has not become invalid after *Katz* simply because the concept was used in *Olmstead*. *Katz*, of course, did not completely eliminate for Fourth Amendment purposes the relevance of location. Obviously, the protections of the Fourth Amendment are stronger in the home than in other areas of reduced privacy interest. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980). The curtilage is an area traditionally associated with the home (see note 2, *supra*) and hence entitled to greater protection than a field. Moreover, the concept of curtilage does not embody a "rigid property concept[]" (Pet. Br. 17) or "per se 'locational' theory" (Pet. Br. 18); to the

In any event, it is clear in the circumstances of this case that the gate and fences around petitioner's farm conferred no expectation of privacy on him whatsoever. First, the fields in question were leased by petitioner to two other individuals, while adjoining fields were apparently leased to other persons (J.A. 34). Petitioner himself testified that he had nothing to do with the leased property for the period of the lease and considered it as if it were owned by the lessees (J.A. 34-35). Plainly, petitioner had no expectation whatsoever that persons unknown to him would not enter these fields at the invitation of the lessees and hence no reason to believe that any activities that he carried on in the fields or objects left there would remain private from outsiders. Whatever expectation of privacy theoretically could have been secured by petitioner by posting and fencing the fields did not exist here because his leasing of the fields relinquished his right to select the persons permitted to enter.

Moreover, the gate and fences involved here provided no basis for either petitioner or the lessees to believe that persons would enter the fields by invitation only. While the gate did restrict unauthorized entry by vehicles, it is undisputed that there was no physical impediment to entry by foot. The record unequivocally shows that there was a fence on only one side of the gate and that the officer followed a frequently used path around the end where there was no

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contrary, even before *Katz*, the concept of curtilage in this connection was based on consideration of a multitude of factors that basically were directed at determining whether an area was entitled to some expectation of privacy because of its association with the home. See, *e.g.*, *United States* v. *Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981); *Care* v. *United States*, *supra*, 231 F.2d at 25.

fence (J.A. 16, 22). Thus, the "fencing" of petitioner's fields simply provided notice that it was private property but gave him no additional reason to expect that persons would not enter the fields on foot. Accordingly, any expectation that petitioner or the lessees of the fields could have had that objects in the fields would remain private from outsiders entering on foot rested solely on the notice provided by the "No Trespassing" signs.[10] That is

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[10] Petitioner also suggests (Br. 23) that the "highly secluded" nature of the marijuana fields contributed to his legitimate expectation of privacy. It is true, of course, that the fields were partly secluded in the sense that trees obstructed a view of the fields from a point off petitioner's property in one direction and the marijuana was not discernible at all from off petitioner's property. But that is not dispositive of the question presented here concerning the application of the open fields doctrine, which involves the admissibility of evidence discovered as a result of a technical trespass onto private property. The fields involved here plainly were not secluded from persons who entered petitioner's property on the unobstructed path. Contrary to petitioner's implication (Br. 13) that the officers hacked their way through dense underbrush to reach the marijuana, the record shows that the investigating officers simply walked along the road or path until they discovered the marijuana (J.A. 4-5, 19). Thus, the fields where the marijuana was discovered were just as "open" for the purposes of the open fields doctrine as any other area of petitioner's property beyond the "No Trespassing" sign. To the extent it may be argued that some portion of an open field may enjoy additional Fourth Amendment protection because the topography of the land secludes it from the rest of the field, that question is not presented here.

Petitioner also notes (Br. 23) that the officers were mistaken for hunters and told that no hunting was allowed in the field. This also put the officers on notice that they were on private property, but, given that such notice had already been given by the "No Trespassing" signs, it is of no particular relevance to the question presented. It should be noted,

simply an insufficient basis for treating an open field as a private area for Fourth Amendment purposes—let alone an area of such privacy that police are barred from entering unless they have a warrant based on probable cause.

The courts of appeals consistently have held that measures that serve only to notify an outsider of property rights but pose no actual barrier to entry, such as posting signs, are insufficient to convert an open field into an area protected by the Fourth Amendment. See, *e.g.*, *United States* v. *Hensel*, 699 F.2d 18, 32 (1st Cir. 1983); *United States* v. *Ventling*, 678 F.2d 63, 66 (8th Cir. 1982); *United States* v. *Williams*, *supra*; *McDowell* v. *United States*, *supra*. The cases cited by petitioner and their supporting amici rejecting application of the open fields doctrine (see Pet. Br. 28-38; ACLU Br. 43 n.8) all involved fencing more substantial than that here, which posed at least some impediment to entry; none of those cases recognizes a legitimate expectation of privacy based solely on the hope that all outsiders will abide by a "No Trespassing" sign.[11] Indeed, even some cases

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however, that petitioner's assertion (Br. 5-6) that the officers ignored this warning is contradicted by the record. To the contrary, the officers shouted back that they were not hunters, but police officers, and backtracked to try to speak to the person who had called to them. When they found no one, they proceeded on their way down the road and discovered the marijuana. See J.A. 3-4.

[11] In the case consolidated with this one, *State* v. *Thornton*, 453 A.2d 489 (Me. 1982), cert. granted, No. 82-1273 (Apr. 4, 1983), the court rejected application of the open fields doctrine because of the presence of "No Trespassing" signs and a dilapidated stone wall. While that decision supports petitioner's contention, we regard it as erroneous and urge this Court to reverse it for the same reasons that support affirmance in this case.

that have refused to find the open fields doctrine applicable on their particular facts have suggested that mere posting would be insufficient to confer the protections of the Fourth Amendment on an open field. See, *e.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981). Thus, it is clear that the measures taken by petitioner did not convert his open field into an area in which he had a legitimate expectation of privacy so as to render unconstitutional the officers' warrantless entry onto the field. See Note, *How Open are Open Fields?* United States *v.* Oliver, 14 U. Tol. L. Rev. 133, 159-162 (1982).

2. Petitioner's Ownership of His Open Field Did Not Create a Presumption of a Legitimate Expectation of Privacy

Perhaps recognizing that the erection of a sign does little to alter the character of an open field and thereby make it an area infused with such a privacy interest that probable cause and a warrant is a precondition to entry, amici curiae supporting petitioner take a somewhat different—and more sweeping—approach (see ACLU Br. 24-30).[12] Amici contend (ACLU Br. 29) that "[t]he right of a property owner to exclude others creates a presumptively legitimate expectation of privacy." In other words, despite the lesson of *Katz* that Fourth Amendment rights do not depend on property rights (see page 14, *supra*), amici contend that mere ownership of property automatically confers the full panoply of

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[12] We refer here to the brief as amici curiae filed on behalf of the American Civil Liberties Union of Northern California, the Mexican American Legal Defense and Educational Fund, and California Rural Legal Assistance, which for convenience will be referred to as "ACLU Br."

Fourth Amendment protections upon the owner in every portion of the property, even an open field. Amici continue by explaining (ACLU Br. 29) that "[t]his presumption [of a legitimate expectation of privacy] may properly be defeated only when the property owner has failed to exercise her right to exclude." Amici explain *Hester* on this basis. Since Hester "had not exhibited any intention to keep * * * strangers from his father's land," amici claim (ACLU Br. 12), he "*forfeited* his constitutional protection against unwanted police intrusion" (emphasis added). This approach cannot withstand analysis.

Amici's explanation of the open fields doctrine turns the Fourth Amendment on its head. First, of course, it is simply not correct that a mere ownership interest in property in and of itself creates a legitimate expectation of privacy. While it is true that a property owner's right to exclude others (see ACLU Br. 29) gives him the right to take measures that may create an expectation of privacy, that does not mean that a privacy interest is inherent in the mere fact of ownership of the property. *Katz* itself refutes such a suggestion, and the only authority relied upon by amici for this novel proposition clearly states that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12 (citing, *inter alia*, *Hester*). An individual's legitimate expectation of privacy in an area derives from the reasonableness of his expectation that outsiders will not enter there; there is no basis for such an expectation in an open field.

Second, and more importantly, amici's attempt to harmonize *Hester* with their property-based theory of expectation of privacy is fundamentally flawed.

Indeed, amici's own brief exposes the fallacy of their argument. Amici argue that Hester did at one time have a legitimate expectation of privacy in his open field, but that he forfeited that expectation and its concomitant Fourth Amendment protection because he failed to take any measures to keep strangers off the land (ACLU Br. 12). However, the Fourth Amendment does not require an individual to take affirmative measures to retain constitutional protections that he already has. To quote amici, "[t]he Constitution protects a person's reasonable expectation of privacy; it does not require one to secure it by force" (ACLU Br. 33). Thus, if an individual has a legitimate expectation of privacy in a place, such as his home, he does not forfeit his constitutional protection against unwanted entry if he fails to take a particular action to secure the place, for example, locking the door (cf. ACLU Br. 36). The protections of the Fourth Amendment are not forfeited by inaction; that would "shift to the citizen the onus" (ACLU Br. 33-34) of protecting what the Constitution already protects.[13]

Thus, amici's contention that Hester forfeited his constitutional protection against unwanted entry onto his property because he failed to take measures to

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[13] Of course, an individual may forfeit his legitimate expectation of privacy and concomitant Fourth Amendment protection in an area by taking some affirmative action. For example, the owner of a home surely forfeits his legitimate expectation of privacy in a house or apartment if he rents it to another individual. Similarly, an individual may lose his privacy interest in an article if he abandons it or exposes it to plain view. Hester, however, did none of these things. None of the incriminating evidence found by the police in *Hester* was exposed to anyone who was not trespassing. Cf. ACLU Br. 11-12.

keep outsiders away is untenable. The defect in amici's analysis lies in its faulty premise; Hester *never* had a legitimate expectation of privacy in his open field. Rather, the correct explanation of the holding in *Hester* is the one given by the Court there (265 U.S. at 59): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields." Because Hester had no expectation of privacy in his field and took no exclusionary measures that created one, the officers' entry onto his property did not violate the Fourth Amendment. By the same token, petitioner's posting of "No Trespassing" signs was not a measure that created a reasonable expectation of privacy in his field, and hence the officers' entry was constitutional.[14]

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[14] Amici apparently also suggest (see ACLU Br. 21-23, 27-29, 45-48) that petitioner's field was entitled to special Fourth Amendment protection because it was a form of "commercial premises." This is entirely untenable. The text of the Fourth Amendment actually focuses on private premises ("houses"), not commercial premises. It is true, of course, that commercial premises, such as offices, factories, and warehouses, may be protected by the Fourth Amendment if they are possessed of attributes that confer a legitimate expectation of privacy on an individual—whether or not he is engaged in a commercial enterprise. If anything, however, the protections of the Fourth Amendment apply less stringently to a commercial enterprise than to personal effects. See *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981); *United States* v. *Kaiyo Maru No. 53*, 699 F.2d 989, 995 (9th Cir. 1983). At any rate, an open field used for commercial purposes is no more private than an open field limited to personal use. In particular, amici's contention (ACLU Br. 23 n.5) that petitioner's field was entitled to special constitutional protection because it was used for the illegal commercial purpose of growing marijuana is preposterous.

C. Even Assuming Privately Owned Woods Or Fields Are In Some Circumstances Entitled To Fourth Amendment Protection, A Warrantless Search On The Basis Of Reasonable Suspicion Of Criminal Activity Is Permitted

The fact that an open field is not an area in which a landowner has a legitimate expectation of privacy does not necessarily mean that the character of the land cannot be altered so as to convert the field or a portion of it into an area subject to Fourth Amendment protections. By virtue of his ownership, a landowner has a right to develop his land and make improvements that may give him a legitimate expectation of privacy. Obviously, houses and other buildings stand on what once was an open field, yet they are fully subject to the protections of the Fourth Amendment. Petitioner and the dissent below essentially argue that the mere notification of a desire to exclude outsiders by the erection of a "No Trespassing" sign sufficiently alters the character of an open field to confer a legitimate expectation of privacy upon an individual's activities there. In our view, as argued above (pages 17-18, *supra*), posting a field is too insubstantial a measure to be reasonably expected, as a practical matter, to exclude outsiders from a field, and hence it cannot create a legitimate expectation of privacy in an open field. By contrast, when a landowner takes measures to prevent entry by the public, such as construction of an exclusionary fence, as opposed to the insubstantial livestock fence that usually surrounds a field, it is at least arguable that he has a limited expectation of privacy in the enclosed area. See, *e.g.*, *United States* v. *FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978) (eight-foot high fence topped with barbed wire).

This is not to concede that even substantial measures taken to exclude outsiders from entering an open field should implicate the protections of the Fourth Amendment. Although surrounded by an exclusionary fence, a field is still a field—and unmistakably does not become a person, house, paper, or effect. But even assuming that exclusionary measures at some point create a constitutionally protected privacy interest in a field that requires a reasonable justification for an official intrusion, it does not follow that the field should be given the same constitutional protection as a home, an office, or even an automobile. That is, a search of such a field can be reasonable within the meaning of the Fourth Amendment even if not conducted pursuant to a warrant or based on probable cause. Because the privacy interest in a field, even if measures have been taken to exclude outsiders, does not approach the privacy interest in a home, an office, luggage or other containers of personal effects, or a car, a search of that field is a significantly lesser intrusion than a search of traditionally more private areas and correspondingly requires a lesser degree of justification.

Accordingly, if the traditional understanding of the open fields doctrine is to be modified by extending the protections of the Fourth Amendment to an open field where some measures have been taken to prevent entry by outsiders (or, *a fortiori*, if petitioner's contention is accepted that insubstantial exclusionary measures such as posting a "No Trespassing" sign implicate Fourth Amendment protections), we submit that an entry by law enforcement officers onto such a field does not violate the Fourth Amendment if the entry is justified by a reasonable suspicion of criminal activity.

The substantive command of the Fourth Amendment prohibits "unreasonable searches and seizures." In determining whether this "key principle" of reasonableness has been satisfied, the courts must engage in a "balancing of competing interests." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981), quoting *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). Specifically, the reasonableness of a search or seizure is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967). We submit that the privacy intrusion involved in a search of a field is so limited that, weighed against the government interest in ferreting out suspected criminal activity, such a search is "reasonable" if based on a reasonable suspicion of criminal activity.[15]

First, even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private.[16] Contrary to

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[15] Where a search invades a substantial privacy interest, it generally is considered reasonable only if conducted in accordance with the Warrant Clause of the Fourth Amendment. See *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). If, however, a law enforcement action is permitted on the basis of suspicion short of probable cause, then no warrant can be required.

[16] Apart from aerial observation by law enforcement agents, open areas of private property are subject to intentional observation from the air by aircraft owned by private parties, such as traffic helicopters and news media seeking aerial photographs, or inadvertent observation by persons in air-

amici's contention (ACLU Br. 37 n.7), aerial observation by law enforcement agents has consistently been held not to invade an expectation of privacy recognized under the Fourth Amendment.[17] Indeed,

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craft flying over the property on their way to another destination. See, *e.g.*, *United States* v. *DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980).

[17] See, *e.g.*, *United States* v. *Allen*, 675 F.2d 1373, 1380-1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981); *United States* v. *Mullinex*, 508 F. Supp. 512, 514-515 (E.D. Ky. 1980); *United States* v. *DeBacker*, *supra*, 493 F. Supp. at 1081; *Murphy* v. *State*, 413 So. 2d 1268 (Fla. Dist. Ct. App. 1982); *Goehring* v. *State*, 627 S.W.2d 159 (Tex. Crim. App. 1982); *State* v. *Layne*, 623 S.W.2d 629 (Tenn. Crim. App. 1981); *People* v. *Lashmett*, *supra*, 71 Ill. App. 3d at 531, 389 N.E.2d at 890; *State* v. *Stachler*, 58 Hawaii 412, 418-419, 570 P.2d 1323, 1327-1328 (1977); *Dean* v. *Superior Court*, 35 Cal. App. 3d 112, 117-118, 110 Cal. Rptr. 585, 589-590 (1973); cf. *People* v. *Sneed*, 32 Cal. App. 3d 535, 542-543, 108 Cal. Rptr. 146, 150-151 (1973) (helicopter hovering below navigable airspace at height of 20-25 feet held unlawful).

In *Dow Chemical Co.* v. *United States*, 536 F. Supp. 1355 (E.D. Mich. 1982), relied upon by both petitioner (Br. 35-36) and amici (ACLU Br. 38-39 n.7), the court held that the use of aerial photographs contracted for by the Environmental Protection Agency and taken by a private company violated the Fourth Amendment because enlargement of the photographs revealed details of the outside of Dow's Midland, Michigan, plant not visible to the naked eye (the enlargements referred to in the opinion were made by Dow Chemical for purposes of the litigation, not by the government). That case is consistent with the long line of decisions cited above recognizing the constitutionality of aerial observation. The decison is plainly based on the invasion of privacy that the court found present in the use of the photographic equipment and the possibility of enlargement to show detail, and it suggests that an overflight limited to naked eye observation would not violate the Fourth Amendment. See, *e.g.*, 536 F. Supp. at 1367, 1372. In any event, we view the *Dow Chemical* decision as erroneous, and it has been appealed to the Sixth Circuit, No. 82-1811.

even the dissent below recognized (Pet. App. 63-64) that the marijuana fields here could lawfully have been observed by the police from the air. See also Amici Curiae Brief of California Farm Bureau Federation and Florida Farm Bureau Federation in Support of Petitioner at 16. Because the manner of observation is ordinarily of no consequence to the landowner, he has a limited legitimate expectation of preserving the privacy of things freely observable from the air. See Pet. App. 36 n.4; see also *United States* v. *Knotts*, *supra*, slip op. 9.

More important, the intrusion on the landowner's privacy when police enter a field is not even remotely comparable to the intrusion that is involved when police enter a home or business premises or search through private papers. In the case of a search of a private residence or office, if the police are mistaken in their suspicion of criminal activity, they necessarily disrupt an area that people reserve for their most personal and private matters. The exposure of these matters to outsiders is a most severe intrusion into the privacy of the innocent individual. In order to safeguard these important privacy interests against unjustified invasion, the Fourth Amendment interposes two requirements before a home or office can be searched: the substantive requirement that the police have probable cause to believe that evidence of criminal activity will be found and the procedural requirement that this determination be made by a neutral and detached magistrate.

If the police err in invading an open field, however, the consequences are much less severe. The entry is a minimal disruption of an individual's privacy. Exposure to the police of the contents of an open field is relatively unintrusive. In most cases, the consequence is simply that the police observe nothing but a field

and perhaps some cornstalks or cows; an individual is highly unlikely to keep exposed in an open field personal effects that he wishes to keep private. Because the invasion of privacy resulting from an erroneous search is substantially smaller in the case of a field than in the case of a residence, an office, a closed container, or even an automobile, it is reasonable that the Fourth Amendment standard that must be satisfied before a search may occur be less severe.

Suppose, for instance, that the police receive an anonymous tip that a kidnap victim is being held in the woods inside posted and fenced private property or that a cache of automatic weapons is hidden in a wheat field on a large, fenced farm. Or suppose that an EPA inspector receives information that hazardous chemicals are being illegally dumped near a stream running through such property. Such tips afford reasonable suspicion of unlawful activity but are insufficiently substantiated to provide probable cause, without which no warrant can be obtained. While the police could not rely on information of this quality to search a house, reason dictates that the information affords a sufficient basis to undertake a search implicating the comparatively inconsequential privacy interests in a field or woods. Accordingly, a rational balancing of societal and individual interests in such circumstances calls for allowing a search upon a justification that, while concrete and objectively verifiable, is less substantial than is needed to justify official inspection of more private areas.

This Court has recognized in other contexts that the two basic constitutional prerequisites to a search of a residence do not necessarily apply where there is a substantially reduced privacy intrusion. For example,

a search of an automobile is a significantly lesser intrusion than a search of a residence. As the Court explained in *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

As a result, the warrant requirement is thought to be unnecessary to protect adequately the owner's privacy interests in the vehicle's interior. See also *United States* v. *Knotts*, *supra*, slip op. 5; *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153-155 (Powell, J., concurring); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Even so, it is clear that the likelihood that personal effects will be found in a car (perhaps while in transit to or from a residence)[18] is substantially greater than the likelihood that such personal effects will be found in an open field.

Similarly, seizures that are a minimal intrusion compared to an arrest may be effected on less than probable cause. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1 (1968). And in the context of administrative searches, where there is generally a reduced expecta-

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[18] Even if the personal effects are stored in the automobile in a container that indicates that it contains personal effects, they may be exposed by a warrantless search. See *United States* v. *Ross*, 456 U.S. 798 (1982).

tion of privacy (see *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981)), a search satisfies the "reasonableness" requirement of the Fourth Amendment despite absence of probable cause to believe that a violation will be found, even where a residence is involved. See *Donovan* v. *Dewey*, *supra*, 452 U.S. at 598-602; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538.

Given the extremely limited nature of the privacy intrusion involved in the search of a field, it is appropriate that such searches not be constrained by the strictest level of Fourth Amendment protection. There will be situations where the police receive information not amounting to probable cause that there is evidence of criminal activity in a field, such as a marijuana crop, but it would be difficult to investigate this suspicion further without entry onto the field.[19] In light of the minimal adverse consequences that would occur from an entry if the information turns out to be erroneous, it is "reasonable" within the meaning of the Fourth Amendment, even if a field is posted or surrounded by an exclusionary fence, to permit police to enter onto it on the basis of reasonable suspicion of criminal activity, rather than being forced to ignore the information they have received. See *United States* v. *Johnson*, 561 F.2d 832, 852-853 (D.C. Cir.) (MacKinnon, J., con-

[19] Even where an aircraft or helicopter could verify the suspected presence of a marijuana crop as accurately as an officer on foot, the incremental likelihood that the officer will see private matter not visible from the air is so slight that we find it hard to believe that the Fourth Amendment requires the great added expense of aerial surveillance to safeguard individual privacy interests.

curring), cert. denied, 432 U.S. 907 (1977); *United States* v. *Knight*, *supra*, 451 F.2d at 278.[20]

There can be little doubt that the police officers had a reasonable suspicion that criminal activity was afoot on petitioner's farm before they entered. They received an anonymous tip stating that petitioner had a large amount of marijuana growing on his farm and giving specific directions on how to find the marijuana, namely, by following the Sugar Camp Road (J.A. 2-3, 19). This tip was supplemented by other reports the officers had received from people in the community that there was questionable activity on

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[20] Several courts have suggested that certain police investigative techniques that are more in the nature of searches than seizures implicate the protections of the Fourth Amendment, yet may be conducted based on a level of suspicion less than probable cause. See *United States* v. *Allen*, *supra*, 675 F.2d at 1381 (helicopter surveillance); *United States* v. *Beale*, 674 F.2d 1327, 1334-1335 (9th Cir. 1982), petition for cert. pending, No. 82-674 (dog sniff); *United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981) (beeper installation and monitoring); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978) (beeper installation and monitoring); *United States* v. *Johnson*, 413 F.2d 1396, 1399-1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (inspection of automobile vehicle identification number). The Court has since held in *United States* v. *Knotts*, *supra*, that monitoring a beeper does not implicate any protected Fourth Amendment interest. By the same token, we do not necessarily agree that the other investigative techniques listed above implicate any constitutional protection. Nevertheless, we believe that the courts in these decisions have utilized a sound analytic framework in acknowledging that certain classes of searches, although subject to the Fourth Amendment, are reasonably justified when the police possess reasonable suspicison of criminal activity short of probable cause, but would be unreasonable if conducted on a random or suspicionless basis.

petitioner's farm (J.A. 3). This information raised a sufficient degree of suspicion that the officers would have been remiss in their duties had they not investigated further, and it surely justified the minimal privacy intrusion involved in walking along the path through petitioner's farm to the open field where the marijuana was growing.[21] Thus, even if the Court rejects our primary submission that the posting of his field and the presence of a gate across the road did not give petitioner a legitimate expectation of privacy in his field that implicates Fourth Amendment protections, the police entry onto the field did not violate the Fourth Amendment's proscription against "unreasonable searches and seizures" because it was based on a reasonable suspicion of criminal activity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[21] We emphasize again that, had the suspicions entertained by the police been unfounded, their activities would have produced a quiet afternoon stroll through the cornfields, but no likely exposure to any of petitioner's private effects.

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